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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79–

FREDERICK JOSEPH G.,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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Petitioner, Frederick Joseph G., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fifth Appellate District.[1] Judgment became final and was entered on October 24, 1979, following the issuance of an opinion on August 24, 1979.

OPINIONS BELOW

The opinion of the Court of Appeal affirming petitioner's conviction before a juvenile court upon a charge

[1] The Court of Appeal for the State of California, Fifth Appellate District, will be referred to hereafter as the Court of Appeal.

of murder was filed on August 24, 1979, and is reported at 96 Cal.App.3d 353, ___ Cal.Rptr. ___. The opinion is reproduced as Appendix "A." A timely petition for discretionary review was thereafter filed in the California Supreme Court on September 27, 1979. That court filed an order denying review on October 18, 1979,[2] and the judgment of the Court of Appeal became final on October 24, 1979.[3] (Cal. Rules of Court, rules 25, 28.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Where a state places an individual in jeopardy of penal confinement during his adulthood—potentially of lifelong duration—for a crime allegedly committed during his minority, do the Sixth and Fourteenth Amendments' guarantees of trial by jury apply to the proceedings?

2. Does a state comply with the "due process" and "equal protection" requirements of the Fourteenth Amendment where it remolds its laws relating to the prosecution of minors for crime to expressly provide for the assignment of moral responsibility and blameworthiness, but withholds same right of trial by jury which it staunchly guarantees to those accused of even the pettiest crimes during their majority?

[2] The order of the Supreme Court of California denying discretionary review is reproduced as Appendix "B."
[3] The judgment is reproduced as Appendix "C."

3. Does a state appellate court comply with last term's decision in *Jackson* v. *Virginia*[4] where it upholds the conviction of an individual for a grave offense based upon a mere modicum of evidence provided by an accessory to the crime whose incredibility was openly declared by the trial judge, and whose version of the crime was contradicted as to virtually every surrounding detail the witness' own prior statements and by other witnesses called by the prosecution?

(a) Does *Jackson* v. *Virginia* permit a state first-level reviewing court to refuse to take cognizance of the whole record of evidence once it discovers the first scintilla of incriminating evidence which is not "impossible" in the sense that it violates the laws of science?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments, which provide in pertinent part:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Amendment XIV:

Sec. 1. ". . . no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] (1979) ___ U.S. ___, 99 S.Ct. 2781.

STATEMENT OF THE CASE

This case arises from an incident which took place in Bakersfield, California, on March 14, 1978.[5] At 8:00 a.m. on that date, the body of one Liz Moore was discovered at a crossroads inside the grounds of a local cemetery. An elastic belt was tied about the victim's neck, and there was a laceration above the right ear. The county coroner testified that death was caused by asphyxiation and multiple traumatic injuries.

Based solely upon statements made by one Connie Balderas, allegedly present at the scene, petitioner alone was prosecuted in the juvenile court. Another (adult) individual, Lillian Ortiz, was necessarily guilty as a co-principal under Balderas' version of the facts and was taken into custody; prosecutors never proceeded against her for the reason they considered the evidence insufficient to present to a jury.[6]

Prior to her courtroom testimony, Ms. Balderas had told several differing stories concerning the murder to the authorities. She had stated at one point that Lillian Ortiz alone had done it; at another, she said it was a "black guy." Balderas had first denied seeing anything at all; she admitted being under the influence of heroin at the time.

Balderas had been promised help in relocating out of

[5] Because the appended opinion of the Court of Appeal engages in a lengthy discussion of the facts, our synopsis of them here is condensed and focuses on certain facts in the record which were not stressed by the court.

[6] The deputy district attorney who prosecuted this case has subsequently stated publicly that the same testimony used to convict petitioner in juvenile court was deemed "insufficient evidence" to present against any adults. ("Prosecutor Says Verdict Right Even If Not Enough Evidence For Jury Trial," *The Bakersfield Californian*, December 4, 1979, Part B, pg. 2, col. 1–4.)

state and intercession on behalf of a jailed boyfriend in exchange for testitying against petitioner. Balderas was shown to have a motive for revenge against petitioner and his brother, having expressed a desire to kill them with "hand grenades" for allegedly cheating her in some type of drug transaction. Balderas had also herself engaged in a past altercation with Ms. Moore, in which she had stabbed Moore with a knife.

In court, Balderas stated that a fight had broken out between Ms. Ortiz and Ms. Moore, and that petitioner had intervened by "lassoing" Moore with a belt. She admitted, however, that she never saw petitioner do this. Ortiz then kicked Moore in the head, and everyone piled in a car driven by petitioner's brother which ran over the body. Balderas stated she got out of the car and returned to the victim where she attempted to loosen the belt around Moore's neck by turning it 180 degrees. Another explanation for this mission of asserted mercy might be found in the fact she realized she left her shoe at the scene. After returning, Balderas admitted to lifting up Moore's blouse, evidently so as to inspect the size of her breasts.

Balderas claimed to have seen these events in the glow of a pole light located inside the cemetery. The superintendent of the cemetery testified, however, that there were no such lights present. The county coroner added that it would have been impossible for the belt around Moore's neck to have been turned around as described without leaving lacerations. The pattern of injuries was also inconsistent with the body having been

run over by a car as Balderas had testified.

A young woman named Sandra Garcia testified that she had looked into the cemetery at the time of the murder, saw two women fighting, one of whom then fell silent to the ground. She did not see any male intervene in the fight, and did not state petitioner was even there. Earlier that day, she had seen Moore at a K-Mart store in the company of another man who was not petitioner. Other witnesses also testified that Moore was in the company of persons other than petitioner prior to her murder.

Petitioner presented evidence of an alibi; as well as evidence he did not own any belt similar to that used in the murder.

At the conclusion of the case, the trial judge remarked openly that he believed very little of Balderas' testimony, save for the one passage where she incriminated petitioner; he remarked that he was under no compulsion to explain why.

The Court of Appeal upheld the conviction on the theory that this one passage was not inconsistent with the laws of physics, and refused to take cognizance of the rest of the evidence. Petitioner's assertion of a right of trial by jury was also rejected. (App. "A" p. 13.)

REASONS FOR GRANTING THE WRIT

I

SINCE CALIFORNIA HAS CHOSEN TO IMPOSE MORAL CONDEMNATION AND PUNISHMENT

UPON JUVENILES WHO COMMIT MAJOR CRIMES, AND TO EXTEND IT FAR INTO ADULTHOOD, THE TRIAL OF AN OLDER YOUTH FOR A MAJOR CRIME IS A "CRIMINAL CASE" WITHIN THE MEANING OF THE SIXTH AMENDMENT

This Court has observed on many occasions that

> "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights. [Citations]" *Planned Parenthood* v. *Danforth* (1976) 428 U.S. 52, 74.

The Court has also spelled out over the last decade or so a rough formula for determining exactly how much "process" is "due" a citizen who happens to be a minor in a given context. In harmony with the general development of the concept of due process [7] it can be generalized that the amount of "process" due—or the amount of "protection" which is "equal"—depends upon the nature of the actual consequences at stake in a given proceeding, not upon wooden labels. (Cf. *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, 542.)

Thus, where the matter at hand is a parent's exercise of his obligation to provide needed psychiatric or medical care for his minor child, that exercise need be surrounded by very little in the way of formal legal process, even if the parent seeks state-administered care. *Parham* v. *J.R.* (1979) ____ U.S. ____, 99 S.Ct. 2493:

[7] See, e.g., *Goldberg* v. *Kelly* (1970) 397 U.S. 254.

> "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and judgment . . . [n]atural bonds of affection lead parents to act in the best interests of their children" ____ U.S. at ____, 99 S.Ct. at 2504.[8]

But where, as here, the state seeks to impose not only a "massive" but an overtly punative curtailment of liberty upon a citizen because of his commission, while a minor, of a criminal offense, the task of interest-balancing takes on different dimensions. Because of the grave implications of incarceration in training schools and reformatories, the Court has taken pains to insure that the finding of facts be done in a fair manner (*In re Gault* (1967) 387 U.S. 1), and has extended protection to minors from involuntary "rehabilitation" where a reasonable doubt as to their guilt exists. (*In re Winship* (1970) 397 U.S. 358.) It is important to note that the Court has insisted on such a standard of proof for juveniles facing "rehabilitation" for crimes, (*Id.*) but has allowed a lesser standard for adults who face involuntary hospitalization not predicated upon commission of a crime. (*Addington* v. *Texas* (1979) ____ U.S. ____, 99 S.Ct. 1804.)

The Court has, however, so far drawn the line in the extension of "criminal" due process rights within the traditionally-constituted juvenile court at trial by jury. The reasoning behind this conclusion has been that the vital and indispensable role played by the jury in accurate criminal factfinding (*Duncan* v. *Louisiana* (1968)

[8] When matters of parental discretion on behalf of their children are considered, moreover, the situation is often colored by the fact the parents' discretion may constitute an exercise of *their own* constitutionally protected rights. (See *Wisconsin* v. *Yoder* (1972) 406 U.S. 205.) Such considerations are decidedly absent here.

391 U.S. 145) is dispensable in traditional juvenile proceedings because they eschew blameworthiness. Instead, they operate to correct deficiencies in the minor's environment rather than to impose disabilities for the sake of public protection or deterrance. (*McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528.) As Mr. Justice White put it in his concurring opinion,

> "The criminal law proceeds on the assumption that defendants have a will and are responsible for their actions. A finding of guilt establishes that . . . they must be punished in order to deter them and others from crime. . . .
>
> ". . . Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control . . . his conduct is not deemed so blameworthy that punishment is required to deter him or others . . . supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties." 403 U.S. at 552–553 (conc. opn.).

Because the California juvenile court law, at least as it relates to murder and other major felonies committed by minors over age 16, no longer has the essential characteristics which this Court found crucial in *McKeiver*, to continue to withhold vital rights from a person facing frankly-imposed punishment for crime is to discriminate against the young merely *because* they are young. Whatever may have been true in Pennsylvania in 1971, the underlying facts of this case vividly demonstrate that such discrimination in the social climate of 1979 leads

factfinding to assume a dubious character, which does indeed dilute the moral force of the criminal law by leaving people in doubt as to whether the innocent are being condemned. (*In re Winship, supra,* 397 U.S. at 365.) [9]

a. Trial By Jury *Is* Necessary To Adequate Factfinding In A Prosecution For A Grave Offense Such As Murder, Regardless Of The Age Of The Accused.

> ". . . When you have a situation wherein you have a jury, and you have to explain to the jury every small aspect and tie up all the small loose ends, you tend to be extremely thorough . . . But, unfortunately, when you get into a situation where you have a juvenile court, and you have 18 to 20, 25 adjudications on a calendar a day you tend to get the assembly-line fever to try to push them through."[10]

It was the prosecution's theory at trial that petitioner assisted Lillian Ortiz in accomplishing the murder of Liz Moore. If the evidence relied upon by the state to convict petitioner was in fact the truth, then Ms. Ortiz is also necessarily guilty as a co-principal.

Ortiz was never prosecuted.

This can only be explained by the fact that Ms. Ortiz was over the age of 18 years, and that the prosecutor

[9] That the conviction of Joey Grijalva has left perhaps an entire community in doubt is dramatically illustrated by the fact that more than a year after his trial, local newspapers are publishing articles questioning the verdict against him. (See "Joey, Killer or Judicial Victim," *The Bakersfield Californian,* December 3, 1979, Part B, pg. 2, cols. 2–5.)

[10] This portion of a prosecutor's argument was read from the transcript of a juvenile trial by the chairman of the California State Bar's Committee on Juvenile Justice at a recent legislative hearing. (Cal. Legislature, Assembly Committee on Criminal Justice, Hearing on Juvenile Court Law, October 9, 1979, pg. 75) (Hereafter designated "Assembly Hearing").

well knew he could not convince a jury to believe the same testimony he used to convict petitioner in juvenile court.[11] The difference in the quality of jury factfinding is demonstrated by the fact, as represented by the California Judicial Council, that a full 6% of all juvenile cases certified for adult trial are not even *filed* by prosecutors after a reassessment of their sufficiency under jury standards. (*Assembly Hearing,* 121.)

There can be no more conclusive proof than this that there is indeed a substantial difference in the quality of jury factfinding in major felony cases.

We are, of course, familiar with the statements in *McKeiver* v. *Pennsylvania, supra,* that the jury trial, if injected into the juvenile court, might make proceedings therein "fully adversary" (403 U.S. at 546), that they might introduce "formality" and the "public trial" (403 U.S. at 551) and, above all, that "the jury trial would not strengthen greatly, if at all, the factfinding function . . . ." (403 U.S. at 548.)

This analysis, though it has been roundly criticized by many, may yet be correct and acceptable in a proceeding where the factual focus is, *in fact,* upon "environmental concerns" and where the dispositional focus will be exclusively upon "providing care and guidance, preferably in [the minor's] own home, as will serve the spiritual, mental and physical welfare of the minor. . . ." As Mr. Justice White again put it,

> "To the extent that the jury is a buffer to the corrupt or overzealous prosecutor . . . the distinctive intake policies and procedure of the juvenile court to a great extent obviate this important function of the

[11] Petitioner easily could have been ordered tried as an adult (Cal. Welf. & Inst. Code § 707) had the prosecutor believed his case was strong enough to convince a jury. (See fn. 6, *ante.*)

> jury. As for the necessity to guard against judicial bias, a system eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice." (403 U.S. at 553.)

None of these features are any longer operative when a minor is being prosecuted for murder in a California juvenile court.

For example, the trial of a juvenile for murder has been squarely held to be "adversary in every sense of the word" (*In re Julius B.* (1977) 68 Cal.App.3d 395, 406, 137 Cal.Rptr. 341). Such a trial is "formal" when a contested issue of fact is being adjudicated. (*People* v. *Superior Court* (Carl W.), (1975) 15 Cal.3d 271, 277–278, 124 Cal.Rptr. 47.) The proceeding may be, moreover, a "public trial" in that the news media can be admitted to the proceedings over the minor's objection. (Cal. Rules of Court, rule 1311(e); *Brian W.* v. *Superior Court* (1978) 20 Cal.3d 618, 143 Cal.Rptr. 517.)

The "distinctive intake" policies which were present in both Pennsylvania and California in 1971 are not present in California in 1979. Now, criminal prosecutors who act on behalf of "the People of the State of California" exercise final control over intake and filing decisions. (Cal. Welf. & Inst. Code §§ 650(b), 655(a).)

Most important, as we point out in greater detail in subdivision (b), *post,* since the California juvenile court during a major felony prosecution is no longer a "system eschewing blameworthiness and punishment," it provides no "operative force against prejudice and short tempered justice" (403 U.S. at 553) sufficient to displace

the jury.

It follows directly that the prosecution of a juvenile for a major felony in California now bears sufficient (if not indeed total) resemblance to a "criminal case" as to make the jury a very essential element of accurate fact-finding. (*Duncan* v. *Louisiana* (1968) 391 U.S. 145.)

1. A Well-Organized And Effective Political Campaign By California Prosecutors To Remove Judges Who Displease Them From Office Underscores The Indispensibility Of The Jury To Accurate Factfinding In Serious Cases.

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and to protect against judges too responsive to higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. (*Duncan* v. *Louisiana, supra* at 156.)

The prescience of the above-quoted language is being demonstrated in California today by an ongoing, organized campaign by "overzealous prosecutors" (or perhaps just ambitious prosecutors) to force the trial judiciary of this state to heel to their commands. As one such prosecutor recently stated publicly, "I believe every judge should be opposed. Everytime. Every judge." This was the same individual who placed ads in newspapers in 1978 soliciting persons to run against judges on a "law and order" platform.[12] His efforts then were sufficiently successful that many highly respected and competent trial judges were turned out of office as "soft on

[12] "Judges Can Expect Challenges in 1980, Says Los Angeles Prosecutor," *Los Angeles Daily Journal,* September 18, 1979, p. 1 cols. 2–4.

crime," even some who had *never presided over a criminal case.* In 1978, over two million dollars was spent by candidates for judicial office in California, and it is predicted that a full 30 to 60 incumbents in Los Angeles County alone will be challenged in 1980.[13]

Whether it is in a metropolis like Los Angeles or a smaller city such as Bakersfield, a judge must know that by declaring a reasonable doubt in very many cases where there is "any" evidence, he will run the risk of being targeted for electoral challenge. Whether the challenge is successful or not, the result may well be personal financial ruin for the judge.

> "Notice is being served that hereafter every judge in the state may become susceptible for the same political pressure as every other candidate for public office this year. Every superior court judge up for reelection . . . is being examined under a microscope by a pro-prosecutor organization. . . . Those who do not meet the standards of [the] Law and Order Campaign Committee will find themselves needing to run expensive campaigns to defend their records against high-powered opposition." Salzman, "Superior Court Hit List: Richardson's Attack on Judges: Most Significant June Ballot Issue"? (December, 1979) 10 *California Journal* 424.

We in no way seek to demean the courage and integrity of California's trial judiciary—the ambitious prosecutors are doing enough of that. Nevertheless, it is simply unrealistic to pretend any longer that mortal men, faced with this kind of pressure, will not be affected by it or that the effect will somehow be blunted by merely professing a concern for "environmental" fac-

[13] The "Election of Judges" (Editorial), *The Sacramento Bee,* September 23, 1979, Forum section, pg. 2, cols. 1–2.

tors.

It was the same realization, of course, which led the framers of our Constitutions to guarantee the right of trial by jury to *all* accused persons, not just those of a certain age.

It is thus both folly in terms of preservation of an independent judiciary, and a disservice to a public entitled to verdicts of guilt or innocence which are unimpeachable and accurate, to continue to fail to recognize that the right to be tried by a jury which won't be standing for reelection is essential to accurate factfinding in serious felony cases.

b. The California Juvenile Court Law Now Provides For The Criminal Punishment Of Minors Guilty Of Major Felonies.

When *McKeiver* v. *Pennsylvania* was written, former California Welfare & Institutions Code Section 502 [14] specified (similar to 1971 Pennsylvania law) that the sole purpose of the juvenile court was to provide "such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental and physical welfare of the minor . . . removing him from the custody of his parents only when necessary for his welfare. . . ."

By a series of legislative amendments in 1976 and 1977, punishment has been added to this list of purposes.

It is now specified that the juvenile court should "impose on the minor a sense of responsibility for his own acts," and, most significantly, that minors may be incarcerated solely for purposes of the "safety and protection of the public." (Cal. Welf. & Inst. Code § 202 (a).) For extra emphasis, a new subdivision (b) was added to say,

[14] New recodified as Section 202.

"The purpose of this chapter also includes the protection of the public from the consequences of *criminal* activity." (Emphasis added.)

It has been squarely held by this Court that where a person is deprived of liberty in order to quarantine him and thereby protect the public from his future conduct, such confinement is punishment; and that is no less so merely because "rehabilitation" is allegedly attempted during the confinement:

> "Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." (*United States* v. *Brown* (1965) 381 U.S. 437, 458.)

In 1975, this Court unanimously applied similar reasoning as to a proceeding under California's juvenile court law:

> " 'Nor does the fact that the purpose of the commitment is rehabilitative and not punative . . . change its nature . . . regardless of the purposes for which incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable but they do not change the drastic nature of the actions taken. Incarceration of adults is also intended to produce rehabilitation' (citations omitted)." (*Breed* v. *Jones* (1975) 421 U.S. 519, 530, fn. 12, *quoting In re Winship, supra* 397 U.S. at 367.) [15]

[15] Judge Irving Kaufman, commenting on the recently-issued ABA standards for juvenile justice, has noted "In cases of Juvenile delinquency, the standards frankly recognize that while reform schools have rehabilitative goals, they are dominated by their punative aspect. Cliches about saving a child . . . do not alter the stark reality—*and necessity of*—punishment. . . . [J]uveniles accused of crime should have the right to the same adult procedural protections that guard against conviction of the innocent. Consequently the standards accord juveniles . . . a six person jury. . . ." (Kaufman, "Juvenile Justice: A Plea for Reform." *The New York Times Magazine,* October 14, 1979, 42, 60.)

That punative purposes dominate California's juvenile court law as much as its adult criminal law is further illustrated by the fact that the statutory purposes of California's notorious San Quentin and Folsom prisons, which are unarguably institutions of punishment, also include "training and treatment." (Cal. Pen. Code §§ 2022, 2032.) It is equally well illustrated by the fact that a minor sentenced to the California Youth Authority [16] may be administratively transferred to a prison institution operated by the California Department of Corrections and placed among the general felon population. (Welf. & Inst. Code § 1755.5.)

Once sent to the Youth Authority, above all, a person is *no longer under the jurisdiction of the juvenile court* (*In re Arthur N.* (1976) 16 Cal.3d 226, 237–238, 127 Cal.Rptr. 641); so, for example, the juvenile court may not substitute its judgment in place of the Authority's regarding parole (*Breed* v. *Superior Court* (1976) 63 Cal.App.3d 773, 778, 134 Cal.Rptr. 228.) The juvenile court may not even vacate its own commitment to the Authority based on new evidence that the minor's rehabilitative needs may be better served elsewhere. (*In re Owen E.* (1979) 23 Cal.3d 393, 154 Cal.Rptr. 204.)

Once the Authority acquires jurisdiction over a minor, it makes its decisions concerning imprisonment and parole "under such conditions as [the Authority] believes best designed for the *protection of the public*" [Cal. Welf. & Inst. Code § 1766(a)] (emphasis added).

[16] For brevity, the California Youth Authority is sometimes hereafter referred to as "The Authority."

Since the enactment of these legislative changes, California courts have lost little time in recognizing their importance. For example, in *In re Maurice S.* (1979) 90 Cal.App.3d 190, ___ Cal. Rptr. ___, the Court of Appeal granted a minor certain credits against his juvenile sentence comparable to those an adult would receive, noting that "The Supreme Court treated *punishment* as the primary purpose for juvenile confinement. . . ." (*Id.* at 194) (emphasis added). The California Supreme Court thereafter denied a petition for review, and later reached the same result on the merits in another matter. (*In re Eric J.* (1979) 25 Cal.3d 522, ___ Cal. Rptr. ___.)

In *In re Donald B.* (1979) 89 Cal.App.3d 804, 152 Cal.Rptr. 868, the court dealt with an individual who was serving an adult penal sentence for crimes committed during his majority. The court permitted the juvenile court to impose additional sentences for crimes committed when Donald B. had been a minor, ignoring an argument that it was impossible for the juvenile court to "rehabilitate" someone while he served time in an adult jail. The court held it to be intolerable for a former juvenile to "use the adult crime as a means of escaping *punishment* for the juvenile offenses" and agreed with the trial court that Donald B. is "entitled to get what he deserves in [the juvenile] court." (89 Cal.App.3d at 807.) (Emphasis added.)

Finally, in *In re Gregory S.* (1978) 85 Cal.App.3d 206, 213, 149 Cal.Rptr. 216, the court observed that the "long overdue objective of juvenile justice" contained in the above-described punative amendments was correctly relied upon as support for the commitment of a thirteen-

year old first offender to the Authority.

The California Supreme Court denied petitions for review in both *Donald B.* and *Gregory S.*

We offer no criticism of either the California Legislature nor of the public which elects it for demanding that the state's response to violent crime by minors *not* be limited to a mere examination of "environmental pressures." But just as it is the state Legislature's prerogative to change the juvenile court law in this way, it is its constitutional responsibility if it does so to assure those facing punishment a trial adequate under the Sixth Amendment.

c. The Rationale Of *McKeiver* v. *Pennsylvania* Is Inapplicable To Proceedings Which Lead To Incarceration, Often Next To Adult Offenders, For As Long As *Five Years* Past The Attainment Of Majority.

As stated above, the rationale of *McKeiver* v. *Pennsylvania* boils down to the proposition that full "criminal" due process safeguards need not apply to a proceeding where the state seeks to substitute itself for a minor's parent in discharging the essentially nurturative duty of educating and preparing the minor for adulthood. (Very significantly, the Pennsylvania statute did *not* authorize incarceration past attainment of majority.) The state's interest in the discharge of its duty as *Parens Patriae* is thus a "compelling" one which justifies differential treatment.

As even the *McKeiver* court had to recognize (403

U.S. at 535) this reasoning is vulnerable to the often obdurate refusal of state governments to provide the resources needed to make the theory a reality, a refusal which continues unabated almost a decade after the decision.[17] For the purposes of this case, however, we may assume, arguendo, the validity of the *McKeiver* rationale without lessening the truth that petitioner has been subjected to criminal punishment without a proper criminal trial. *McKeiver* is simply inapplicable to this case because California has initially sentenced petitioner to incarceration for as long as *five years during the period of his adulthood,* to age 23 [Cal. Welf. & Inst. Code § 1769(b)], subject to indefinite renewal under California Welfare & Institutions Code section 1800 ff.

The compelling state interest defined in *McKeiver* ceases to exist at the point where the state embraces punishment or where it extends incarceration past the period of minority. Whenever either event occurs, the Court no longer need inquire whether enforcement of a given constitutional guarantee will "compell the states to abandon or displace any of the substantive benefits of the juvenile process" (*In re Winship, supra,* 387 U.S. at 21), for the state has abandoned those "benefits" by its own deliberate choice.

1. Age 18 Is The Beginning of Adulthood And The End of Any *Parens Patriae* Interest Of The State.

[17] As late as Decmeber, 1979, conscientious juvenile court judges still could do no more than meekly bemoan the lack of treatment resources. As Richard P. Byrne, the Presiding Juvenile Judge for Los Angeles County put it in a letter to the Editor: ". . . It's paradoxical that at a time when governmental officials perceive the juvenile crime problem to be getting worse that problems such as the county's outstanding camp program are cut back. . . . Talk is cheap. Programs cost money. . . ." ("Juvenile Justice System in L.A.," Letters to the Times, *Los Angeles Times,* December 6, 1979, Part II, pg. 6, col. 5.)

As Mr. Justice Black pointed out in his lead opinion in *Oregon* v. *Mitchell* (1970) 400 U.S. 112, 143,

> "[Eighteen year olds] are generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult. Moreover, we are advised that under state laws, mandatory school attendance does not . . . extend beyond age of 18."

Following this observation, Congress and the states further made clear that age 18 was to be the dividing line between minority and adulthood by promulgating the Twenty-Sixth Amendment to the Constitution. Much in direct consequence of this fact, the California Legislature acted to fix the age of majority at 18 effective March 4, 1972,[18] i.e., roughly nine months after the decision in *McKeiver* v. *Pennsylvania* had been filed. These statutory changes specifically included a drop in the age of juvenile court jurisdiction to 18; previously, it had been permissive up to age 21. (*Ibid.*)

As we have pointed out, California has gone even further than imposing confinement past age 18: it imposes it to *age 23* upon adults found to have committed enumerated major crimes while during their minority. [Cal. Welf. & Inst. Code §§ 707(b), 1769(b)], and this period may be further extended *indefinitely* by an order for further detention pursuant to California Welfare & Institutions Code section 1800.

[18] Cal. Civil Code § 25.1; Cal.Stats. 1971 ch. 1748; Cal.Stats. 1972 ch. 84.

". . . [T]he sentencing court's understandable desire to impose a substantial period of confinement for society's protection could have been amply fulfilled by a Youth Authority Commitment. . . . Indeed, should defendant thereafter remain dangerous to the public, the Youth Authority would have the authority to establish grounds for an extended commitment (Welf. & Inst. Code § 1800) in comparison, defendant's confinement to state prison in all probability would not extend . . . beyond a Youth Authority commitment." (*People* v. *Carl B.* (1979) 24 Cal.3d 212, 219, ____ Cal.Rptr. ____.)

It is well to recall at this point that the appellant in *Duncan* v. *Louisiana* was age 19 and was placed in jeopardy of two years' imprisonment for simple battery; had he received the maximum sentence, Duncan would have been released at age 21. In our mind, the bounds of reason are tested considerably when one tries to explain why petitioner, facing at least *five* years of adult confinement, should be entitled to fewer rights than was Mr. Duncan.

2. California Appears To Go Further Than Any American Jurisdiction In Its Extension Of Punishment Into Adulthood.

We know of no American jurisdiction—including Pennsylvania in 1971 (see Penn. Ann. Stat. Title 11 § 750 [1971])—which keeps persons incarcerated beyond their majority for crimes committed during their minority without affording them a jury trial, and we are particularly unaware of any such jurisdiction which does so while guaranteeing a jury to those over age 18 who face

as little as a $100 fine. (*Tracy* v. *Municipal Court* (1978) 22 Cal.2d 760, 150 Cal.Rptr. 785.)

The federal Juvenile Delinquency Act, for example, specifies that commitment may not extend beyond the maximum term which could have been imposed upon as adult or age 21, whichever comes first. [18 U.S.C. § 5037(b)].[19] Moreover, a juvenile proceeded against under the federal act has a right, unlike petitioner, to demand to be treated as an adult, with attendant rights to a jury trial (18 U.S.C. § 5032).

Perhaps above all, unlike his California counterpart, a federally-adjudicated juvenile delinquent may not be placed in any correctional institution in regular contact with persons convicted of crime as adults. (18 U.S.C. § 5039.)

II

THE COURT OF APPEAL HAS MANAGED TO CONSTRUE *JACKSON* v. *VIRGINIA* AS PERMITTING THE AFFIRMANCE OF CONVICTIONS WHERE THERE IS MERELY ANY EVIDENCE OF GUILT, AND HAS THUS IMPROPERLY UPHELD PETITIONER'S CONVICTION NOTWITHSTANDING THE EXISTENCE OF A REASONABLE DOUBT AS A MATTER OF LAW

It is quite clear that despite its elaborate disclaimers, the Court of Appeal has examined the record of petitioner's trial and upheld his conviction because it found a mere modicum of evidence to support it. In one quick

[19] As was brought out in the debate surrounding the lowering of the voting age, age 21 has been recognized as the outside limit of minority since at least the eleventh century. (See 1971 U.S. Code Cong. & Admin. News at 365–367.)

stroke, *Jackson* v. *Virginia* has thus been wrestled to the ground in California. Especially given trials without juries, this may well mean that factually innocent defendants are guaranteed only as much protection as the unreviewable whim of an individual judge wishes to afford.

The constitution, we think calls for more than this.

At page 18 of its slip opinion [20] the Court of Appeal makes the following statement:

> ". . . [Petitioner] impliedly implores this court to independently determine from the whole record whether the evidence was sufficient to conclude that appellant is guilty beyond a reasonable doubt. . . . [T]he appellate court will not uphold a verdict based upon evidence which is inherently improbable, and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is sure or the falsity of the evidence is apparent without resorting to inference or deduction. [Citations.] There is nothing in this record rendering Balderas' version inherently improbable, physically impossible, or legally unbelievable."

Prior to this passage, the court, while reciting that had reviewed the "whole record," had observed that "the testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent, or false as to other portions [citations]" (slip opn. at 17, app 1 at 19).

This standard of review is obviously indistinguishable from the "any evidence" standard which prevailed in California prior to this Court's decision in Jackson:

[20] App. 1 at 20–21.

> "[T]he court, under the strictures of the *any* substantial evidence rule, may consider only *some* of the evidence, i.e., that favorable to the prosecution. This "favorable" evidence, isolated and outweighed as it might be, . . . will support the guilty verdict so long as it is not a *"physical impossibility,"* or *on its face* without consideration of other evidence of inferences, "false." (See *People* v. *Lyons* [19] 47 Cal.2d 311, 320 [303 P.2d 329].) All of the remaining evidence, regardless of its convincing and impeaching force, must be rejected from consideration." (*People* v. *Blum,* 35 Cal.App. 515, 523, 110 Cal.Rptr. 833, [Elkington, J., concurring]).

It is thus unmistakable that while the Court of Appeal may have "reviewed" the "whole" record, they upheld petitioner's conviction because they merely found therein a modicum of evidence which was not on its face inconsistent with Newtonian physics. "Review" of a record is obviously meaningless if everything in it inconsistent with guilt is to be ignored.[21]

Since virtually *everything* else in this record points to the conclusion that Connie Balderas' version of the death of Liz Moore was a story woven from whole cloth, it is equally unmistakable that the Court of Appeal did not properly apply the teaching of *Jackson* v. *Virginia*

[21] That several appellate courts in California are playing games with *Jackson* v. *Virginia* is quite vividly illustrated by the opinions filed in *People* v. *Baldwin* (1979) 97 Cal.App.3d 396, 402–403, ___ Cal.Rptr. ___. Initially, and evidently unaware of the existence of *Jackson,* the court scoffed that "The argument made . . . suggests that California appellate courts . . . must instead determine whether a reasonable jury could have found proof beyond a reasonable doubt. . . ."

On October 15, 1979, the court, having been made aware of *Jackson* by a petition for rehearing, filed a modification of its opinion which stated, much like in the instant case, that the *Jackson* standard (which it had just explicitly rejected) always had been the law in California, and re-affirmed Baldwin's conviction (98 Cal.App.3d at 533a, ___ Cal.Rptr. ___).

and that it has permitted the conviction of a palpably innocent individual to stand.

A reasonable person, giving effect to the whole of this record, would necessarily experience a substantial "hesitation" in reaching a conclusion that Connie Balderas was telling the truth; such a hesitation is, of course, the essence of a reasonble doubt.[22] For this reason, the "any evidence" affirmance of petitioner's conviction was constitutional error.

CONCLUSION

We continue to cherish the belief that the Fourteenth Amendment's assurances of equal protection of the laws and of due process of law to those facing loss of liberty are meant to guarantee individuals something more than a hollow ritual. Clearly, a system which cannot confidently reach factually correct results in cases affecting vital human interests is worthless no matter how many procedural nicities are attached to it.

The unavailability of neither a jury nor meaningful appellate review, as here, create a constitutionally unacceptable risk that innocent persons will be convicted and condemned to punishment for grave offenses; the facts of this case place that risk in perfect relief.

Certiorari should be granted to correct the serious "design defects" in California system of adjudication of major criminal charges against the young which this case reveals.

DATED: December 21, 1979

Respectfully submitted,

[22] Devit and Blackmar, *Federal Jury Practice and Instructions* (1977) § 11.14.

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By _____
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APPENDIX A

5 Civil No. 4311
(Super. Ct. No. 44425)
Filed Aug. 24, 1979 [96 Cal.App.3d 353]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK JOSEPH G.,

Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of Kern County, sitting as a juvenile court, finding jurisdiction and determining disposition. Walter Osborn, Jr., Judge. Affirmed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, Ezra Hendon, Chief Assistant State Public Defender, and Laurance S. Smith, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Edmund D. McMurray and Wm. George Prahl, Deputy Attorneys

General, for Plaintiff and Respondent.

Frederick Joseph G., a minor, aged 17 years, was found to be a person coming within the provisions of Welfare and Institutions Code section 602 in that he was guilty of murder in the second degree (Pen. Code, §§ 187, 189). He was committed to the C.Y.A. and appeals. The central theme of appellant's scenario is that the evidence was insufficient to support the trial court's judgment if the record is evaluated under the proper standard of review.

FACTS

Detective Singleton testified that on Tuesday, March 14, 1978, at about 8 a.m., he was called to the Union Cemetery in Bakersfield to investigate the murder of Liz Moore. He found the victim lying on her back in a spread-eagle fashion in a crossroads. She had on Levi's which were buttoned but unzipped. There was blood on her head and the pavement below, a laceration on her left ear and an abrasion on the left cheek area. There was also a laceration on the right side of her head above the ear. A black and brown elastic belt was tied around her neck. There were abrasions on her back also. Detective Singleton also testified that there were needle marks on the victim's arms, the ring on her left hand had been smashed and there was an abrasion on her right hand. A curb feeler from an automobile was found next to the victim's body.

At the trial Connie Balderas testified that on the night

before the murder (Sunday, March 12) the victim was at her house with someone named Chris, Frank G. (appellant's brother), Lillian Ortiz and appellant. She stated that they partied all afternoon, using heroin, angel dust and marijuana. She stated that they later left and went to El Montecito and La Capa, two bars, with Pete Ramirez. They couldn't get into the bars because Pete wasn't old enough, so they went back to Balderas' house. She testified that she got up at 7:30 the next morning (Monday, March 13) and she and the victim used heroin. She then left for work at a car wash.

After work, she saw the victim on the street. Balderas used heroin, and although she didn't see the victim use it she assumed she did.

Counsel stipulated that expert testimony would establish that blood and bile samples taken from the victim were tested and were found to not contain any traceable quantities of heroin. It was also stipulated that the expert would testify that it would be improbable that heroin would be completely eliminated from the bloodstream in only eight hours.

Balderas testified that she and the victim left to go to California Park and met Frank, Lillian Ortiz and appellant. They first went to K-Mart and the liquor store, then to Union Cemetery. At the cemetery, Frank G. and Lillian Ortiz had sexual intercourse. Appellant attempted the same with the victim, who later told Balderas he had been unable to accomplish the act. Appellant told her to "shut up" and seemed embarrassed by the victim's statement. The victim and Balderas teased appellant about

his inability to perform sexually.

Balderas testified that the victim and Lillian Ortiz got into a fight over Balderas' boyfriend. The fight started when the victim began kidding with Lillian that she had had sexual intercourse with Balderas' boyfriend. The victim took off her belt and hit Lillian with it. Lillian then asked appellant for his belt, and he gave it to her. The two women began fighting with the belts. Balderas got between Liz and Lillian and asked them to stop fighting. Liz tried to get away from the fight by running. Appellant, however, began running after Liz cussing at her. Appellant said he was going "to show this bitch how to run." Appellant lassoed Liz around her neck with the belt he had taken off and given Lillian. Liz fell to her knees and fought with appellant to get the belt off her neck. Balderas pulled at appellant's hair and tried to pull him away from Liz. Meanwhile, Lillian kicked Liz Moore in the cheek. Liz then fell to the ground on her stomach and stopped fighting. The belt was around her neck with a knot tied in the back. Balderas did not see appellant actually tie a knot around the victim's neck. However, Balderas never saw Lillian in a position to have knotted the belt around Liz Moore's neck. After Liz had fallen to the ground, appellant said "Oh, my God, I've killed her."

Balderas stated that everyone then got in the car and ran over the victim, which turned the body over so she was on her back.

Balderas testified that after the rest of the group left the cemetery she got out of the car and returned. She

picked up the victim and twisted the belt around to try to loosen it so as to "help her out."

Several days later, appellant, Frank G. and "Fat Eddie" came to her house to clean the car, but Ms. Balderas refused to let them. Lillian Ortiz, Frank G. and appellant came later to discuss their stories regarding the incident.

Balderas stated she called the police a day or two after the murder and about a month later but didn't tell the officers the truth because she was scared. The first time she told the officer that she believed Lillian Ortiz to be responsible for the murder. On the second occasion she told the police that decedent had "burned" some people over a quantity of heroin and that several days before the homicide appellant and Frank G. had been at Connie's house and had said they would get the victim for that.

When questioned regarding promises made to Balderas while interrogating her, Detective Singleton testified that he told her she wouldn't go to jail if she was not involved in the actual homicide and that if she wanted to leave town the police would assist her. When questioned as to promises made regarding her boyfriend who was incarcerated, Detective Singleton replied: "I told her that at the conclusion, if she wanted to to go Texas, we would send her to Texas if we could and also we would send Benny if she wanted him to go or to assist." Balderas was not given immunity from prosecution for the crime. During the trial she was extended immunity as to her admission about heroin use only.

Detective Singleton contacted Sandra Garcia at juvenile hall. Garcia told him that on Monday, March 13, at about 7 p.m. she was at K-Mart buying paint; she saw the victim with Larry Montez. The victim asked her to go riding with them, but she declined and they left in a white station wagon with two males and two females. Ms. Garcia stated she left K-Mart and went to California Park and sniffed paint and smoked angel dust. The vehicle passed again with the same occupants, and she again declined the victim's offer to go riding. Garcia decided to go to her stepmother's near Union Cemetery. At about 8 or 8:30, as she walked through the cemetery, she saw two females fighting near a vehicle and heard a moan as one fell to the ground. She then saw people get into the car and drive past her and noticed Larry Montez was still driving the vehicle. Detective Singleton took Garcia to the scene where she pointed out the area in which the fight occurred. It was approximately where the body was found.

Detective Singleton subsequently recontacted Garcia, who then indicated that her prior story regarding seeing the victim with Larry Montez was not true. She refused to tell him who was with the victim.

At trial Sandra Garcia testified that she saw the victim at K-Mart at 7:30 on Monday night with a Mexican man but not appellant. She left K-Mart and went to California Park and saw the victim in the same car. Garcia then went to the cemetery. She said there was enough light for her to see two girls arguing and fighting. One of the females fell. The others got in a car and ran over the

body. Ms. Garcia testified that the car was the same one she saw at K-Mart and that the male accompanying the victim looked like Larry Montez. She said that when questioned by Detective Singleton he told her she was lying and appellant was involved, and she refused to talk further as she felt it was futile.

Lillian Ortiz, Frank G. and appellant were arrested for the offense on April 12. Appellant was questioned and denied knowing the victim and denied involvement in the killing. Frank G.'s car was seized and identified by Balderas as the car which was driven on the night of the murder.

Detective Singleton testified at trial that no curb feeler had been found on Frank's car, nor was there any evidence that one had been there.

Detective Singleton also indicated that a lime green, mid-sixties, "low-rider" vehicle with "rocket-type mags" had been suspected and that rubber molding with lime green paint on it had been found at the scene several days after the body had been found.

The defense consisted of alibi testimony and testimony tending to impeach and discredit the prosecution's principal witness, Balderas.

In addition to the testimony of Sandra Garcia regarding the victim's being with Larry Montez just before the murder, appellant called his mother, Veronica G., who testified that she knew appellant was at home all day Sunday because he was there when she left for work and when she called home during the early evening. On Monday, March 13 (the day of the murder), appellant

visited the Acostas twice, one at 11:30 a.m. and again around 2 p.m. At about 4 p.m. appellant went with his mother, brother and sister-in-law to look at cars for his brother. He returned with his family and spent the evening of Monday, March 13, at home. On Tuesday, March 14, his mother gave him a check to buy a concert ticket. Veronica testified that the only belt appellant owned was a beige Boy Scout belt.

Margie Acosta confirmed Veronica's testimony as to visits made by appellant to her home. She also testified that the belt involved in the murder was not appellant's.

Rachel Ortiz testified that she saw appellant's brother, Frank G., whom Balderas testified was present when the murder occurred, Saturday, and they went to Sammy Garcia's and spent the night. They went riding and then returned to Sammy's. Sunday night they went to the El Morocco Motel and spent the night. On Monday, March 13, they went to see Frances Gonzales and then went to Sammy's. On Monday night, Frances and a man named Raymond stayed with Frank and Ms. Ortiz at the motel.

David Maceas, Lillian's boyfriend, testified that he had been with her on Monday because he remembered taking her to the cleaner's on Tuesday and seeing police cars at the cemetery.

Frank G. testified that he registered at the El Morocco Motel on Sunday as John Lopes. A motel registration corroborating his testimony was introduced into evidence.

Arg Rogers testified that she saw the victim on Sunday, March 12, at 11 at her home. She testified that the

victim was at her house again on Monday at 12 and left with a guy in a truck. She saw the victim later with another man in a truck. The victim returned at about 2 or 3 p.m. She left at 6 p.m.

Mary Ann Ramos, Mrs. Rogers' granddaughter, testified that she last saw the victim on Monday at 6:15 p.m. She had borrowed a black belt from Ms. Ramos.

Dr. Dominick Ambrosecchia of the coroner's office testified that the cause of death was asphyxiation due to a belt tied around her neck and multiple traumatic injuries. Contrary to Ms. Balderas, Ambrosecchia also testified that the belt could not have been turned from back to front as it was so tight that doing so would have caused abrasions. He saw no evidence that blood had flowed from the victim's nose. He also testified that the marks on the victim's back were not consistent with the car running over her. He thought it was unlikely that the victim's body could have been flipped over by running over it with a car.

Frank Dobesh, Superintendent of Union Cemetery, testified that there are no lights in the cemetery and the closest lights are street lights located about 100 yards outside the cemetery.

Frances Devora testified that the victim and Lillian Ortiz were on extremely bad terms and that she would be very surprised to see them together. In contradiction to Balderas' testimony, Ms. Devora also testified that Frank G. and appellant did not attend services for the victim and that it was Frances' sister, Victoria, who placed a black rose on the coffin. Victoria Devora con-

firmed this testimony.

When confronted with prior inconsistent statements, Balderas repeatedly did not recall making them or admitted she had made them up. Balderas did not remember having said that "they ran over her first and then strangled her." She denied saying that "[t]hey wanted to rape her after she was dead but they didn't have the guts to." She also stated she lied when she said that she heard Lillian Ortiz say she finished the victim off.

Ms. Balderas testified that before the killing she took a friend who wanted to buy angel dust to meet "Fat Eddie," Frank G. and appellant. Fat Eddie, Frank G. and appellant took the money without giving them any drugs and left for good. Ms. Balderas called her brother and got some grenades and guns together to go after them.

Balderas also testified that she had had a fight with Liz Moore in which she had stabbed her, and a fight with Lillian during which she shot her twice because Lillian had been going out with her boyfriend.

Balderas testified that there were two pole lights at the cemetery. She stated that she lied when she told the police that a "black guy" killed the victim; that appellant was driving; and that everyone had sex with everyone else that night. She also testified that she remembered telling police that blood was coming from the victim's nose but didn't remember if this was true.

By way of rebuttal respondent presented evidence that after appellant had been arrested he and his mother were placed in a room in the Bakersfield Police Department which was equipped with a monitoring device. During the conversation between appellant and his mother, his mother said that they would find out who started all the trouble for appellant and that the person would pay for it. She also said that, "I am going to find out what date they say this girl is supposed to have been killed. That way I can go back and remember, remember where you were. [¶]I know you were home."

DISCUSSION

Preliminarily we note that most of appellant's brief consists of a scholarly discourse on the constitutionality of depriving appellant of a jury trial and of the substantial evidence rule as he perceives it.

Adverting first to the jury trial discourse, it is settled as of now that ". . . neither the state nor the federal Constitution guarantees a jury trial in a juvenile proceeding." (*People* v. *Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274; *In re Roger S.* (1977) 19 Cal.3d 921, 938; *Richard M.* v. *Superior Court* (1971) 4 Cal.3d 370, 376; *In re Daedler* (1924) 194 Cal. 320, 332; *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, 545.) We are bound by these decisions. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Turning next to the substantial evidence rule, it is undoubtedly true that there have been some misquotations and misapplication of the rule as well as distortions of it by the quotation of selected parts to fit the factual situations in particular cases. Nevertheless, the true scope and import of the rule has been made clear by

leading Supreme Court decisions. Because considerable argument has been devoted to the subject by the parties, it is necessary to quote at some length from leading California cases on the subject before proceeding to a consideration of whether the California standard of review has been changed by the recent United States Supreme Court case of *Jackson* v. *Virginia* (1979) _____ U.S. _____ [99 S.Ct. 2781].

The leading case in this area is *People* v. *Redmond* (1969) 71 Cal.2d 745, 755–756, which instructs:

> "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]
>
> "Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.] Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]
>
> "In *People* v. *Bassett,* 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777], we recently pointed out that, in considering the sufficiency of evidence purporting to connect the defendant with the crime, '*the appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt* [citations]. The prosecution's burden is a heavy one: "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value." ' As *Bassett* points out, this rule has also been applied in numerous cases involving the sufficiency of evidence as to matters other than identification. [Citation.]" (Emphasis added.)

Redmond has been cited and all or parts of its language has been repeated in substance in numerous subsequent cases. (See *People* v. *Reyes* (1974) 12 Cal.3d 486, 496–497; *People* v. *Vann* (1974) 12 Cal.3d 220, 225; *People* v. *Culver* (1973) 10 Cal.3d 542, 548; *People* v. *Kunkin* (1973 9 Cal.3d 245, 250; *In re Roderick P.* (1972) 7 Cal.3d 801, 808–809; *People* v. *Reilly* (1970) 3 Cal.3d 421, 425.)

Reyes and *Kunkin* require particular note. In *Reyes* the court equated the substantial evidence rule with the standard of " 'a reasonable trier of fact' " determining whether the " '. . . prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' " The court stated:

"There is merit to Venegas' contention that the evidence adduced at trial is insufficient to support the judgment rendered against him. In reviewing a criminal conviction, an 'appellate court *must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.*' [Citations.] The substantial evidence rule is our yardstick for determining whether a verdict meets this minimal standard of reasonableness: 'The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] To be considered substantial, evidence must be of the type which 'reasonably inspires confidence and is "of solid value." ' [Citation.]" (*People* v. *Reyes, supra,* 12 Cal.3d at pp. 496–497.) (Emphasis added.)

In *Kunkin,* after reciting the substance of the rule, the court states:

"The substantial evidence rule mandates consideration of the weight of the evidence before deferring to the conclusions drawn from the evidence by the trier of fact." (*People* v. *Kunkin, supra,* 9 Cal.3d at p. 250.)

Implicit in the appellate court's duty to consider the weight of the evidence and to determine "'. . . whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt'" (*People* v. *Reyes, supra,* 12 Cal.3d at p. 496) is the obligation to review the whole record. In no other way can the court determine whether evidence merely raises a suspicion

of defendant's guilt or reasonably inspires confidence and is of solid value. If the court did not review the whole record it would be faithless to its duty under the rule. Accordingly, appellant's contentions that the substantial evidence rule in California does not require the appellate court to look at the whole record and that its duty is satisfied upon the discovery of *any evidence* to support the verdict are without merit.

In *In re Roderick P., supra,* 7 Cal.3d 801, 808–809, the substantial evidence rule as articulated in *Redmond, supra,* was held applicable to juvenile court proceedings.

It remains to determine whether under *Jackson* v. *Virginia, supra,* _____ U.S. _____ [99 S.Ct. 2781] a more stringent standard is required by the United States Constitution.[1] *Jackson* was a federal habeas corpus proceeding in which the federal Court of Appeal had applied the "no-evidence" criteria of *Thompson* v. *Louisville* (1960) 362 U.S. 199 to a state conviction of murder and denied the writ. In *Thompson* v. *Louisville, supra,* the court held that the writ should be denied if there was *any* evidence to support a state court conviction.

The *Jackson* court held that as a matter of due process the standard for evaluating the sufficiency of evidence is whether any rational trier of fact could find guilt beyond a reasonable doubt, stating:

"But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence a the trial established guilt beyond a reasonable doubt.' *Woodby* v. *INS,* 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. Instead the relevant question is whether, after

[1] The respondent concedes that the standard of *Jackson* is binding on the California courts.

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana,* 406 U.S. 356, 362, 92 S.Ct. 1620, 33 L.Ed.2d 152. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." [13] (*Jackson* v. *Virginia, supra,* _____ U.S. _____ [99 S.Ct. at pp. 2789–2790]; fn. 12 omitted.)

In footnote 13 the court further elaborates:

> "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known. See generally 3 Wharton's Criminal Procedure § 520 (1975 and Supp. 1978)." (99 S.Ct. at p. 2790.)

The language in *Jackson* is so close to that used in *Redmond* and subsequent cases as to be indistinguishable in impact or application. The only semantic difference is that the United States Supreme Court in *Jackson* used the work "rational" in its formulation, whereas the California Supreme Court has used the word "reasonable." The words are synonymous. (Webster's New World Dict. (2d College ed. 1972) pp. 1179, 1183.) Accordingly, we hold the California substantial evidence test has not been changed by *Jackson* and that it comports with due process of law.

Applying the foregoing test to the facts of the instant case, we are impelled to conclude that upon examination of the whole record the evidence was sufficient to support the juvenile judge's determination that appellant violated Penal Code section 187 and in concluding it was murder in the second degree (Pen. Code, § 189).

Balderas' sworn statements at trial amount to eyewitness testimony that appellant committed the offense at hand. The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. (Evid. Code, § 411;[2] *People* v. *Robinson* (1964) 61 Cal.2d 373, 389; *People* v. *Matlock* (1959) 51 Cal.2d 682, 695; *People* v. *Maxwell* (1979) 94 Cal.App.3d 562, 574–577.)

While Balderas admits she did not actually see appellant knot the belt around the victim's neck she did observe appellant to lasso the victim around the neck with a belt. She observed them struggling and the victim falling to her knees. Balderas was in back of appellant while he and the victim struggled when the victim attempted to get the belt off from around her neck. She

[2] Evidence Code section 411 provides:
"Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

observed the victim fall to the ground and cease struggling. Appellant stood up and said, "like he was crying," "Oh, my God, I've killed her." Balderas saw that the belt had been tied around the victim's neck and knotted in the back. Balderas did not observe anyone else in a position to have been able to contribute to the strangulation of the victim. Moreover, his oversensitive sexual macho had been sullied by the victim's stinging remarks in the presence of the others regarding his inability to have sexual intercourse. Sandra Garcia corroborated that there was sufficient light to see and that the car subsequently ran over the victim's body and at one point two women were fighting. The testimony of Balderas constitutes substantial evidence to support appellant's conviction.

The thrust of appellant's argument, both below and in this court, is directed toward discrediting the testimony of Balderas. Appellant urges that as a matter of law it does not reasonably inspire confidence and is not of solid value. In doing so he impliedly implores this court to independently determine from the whole record whether the evidence was sufficient to conclude that appellant is guilty beyond a reasonable doubt. As heretofore explained, this goes beyond our duty, it being limited to determining whether there is sufficient evidence upon which a reasonable trier of fact could have found the prosecution sustained its burden of proving defendant guilty beyond a reasonable doubt. It is not our function to reweigh the evidence, reappraise the credibility of witnesses or redetermine factual conflicts, those functions being within the province of the trier of fact. (*People* v. *Culver* (1973) 10 Cal.3d 542, 548; *People* v. *DePaula* (1954) 43 Cal.2d 643, 649; *People* v. *Huston* (1943) 21 Cal.2d 690, 693 (disapproved on other grounds in *People* v. *Burton* (1961) 55 Cal.2d 328, 352).) The limitation in this regard is that the appellate court will not uphold a verdict based upon evidence which is inherently improbable and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is true or the falsity of the evidence is apparent without, resorting to inference or deduction. (*People* v. *Mayberry* (1975) 15 Cal.3d 143, 150; *People* v. *Huston, supra,* 21 Cal.2d 690, 693.) There is nothing in this record rendering Balderas' version inherently improbable, physically impossible or legally unbelievable.

Appellant argues that her testimony could not be considered substantial evidence because: (1) she was an accomplice whose testimony must be viewed with distrust; (2) because of the promise of immunity she had an interest in testifying against appellant; (3) at the time of the events she observed she was under the influence of drugs; and (4) the contradictions inherent in her testimony and between her testimony and other evidence in the case makes her entire testimony unbelievable.

The rule requiring corroboration of an accomplice's testimony (see Pen. Code, § 1111) is not applicable in a juvenile court proceeding. (*In re Mitchell P.* (1978) 22 Cal.3d 946.) Moreover, Balderas was not technically an accomplice in this case. An accomplice is one "who is liable to prosecution for the identical offense charged

against the defendant. . . ." (Pen. Code, § 1111.) There is no evidence to suggest that Balderas aided appellant in the commission of the offense.

Contrary to appellant's statement, Balderas did not testify under a promise of immunity from prosecution for the crime but during trial was given immunity with respect to her testimony regarding her use of drugs. Whatever bias she had as a result of favors she was offered in return for her testimony of her own personal interest in the outcome, like her use of drugs before the murder, merely goes to her credibility and does not render her testimony unbelievable as a matter of law.

Lastly, appellant points to numerous contradictions of and internal inconsistencies in her testimony. The principal conflicts are: Sandra Garcia testified that she only saw two women arguing and fighting. Also contrary to Balderas' testimony, appellant's mother testified that she was with appellant on the night of the murder. Rachel Ortiz and Frank G. both testified that Frank G., whom Balderas testified was at the cemetery when the victim was killed, was elsewhere on the evening of the murder. David Macias testified that Lillian was with him Monday.

The testimony of the pathologist was inconsistent with some parts of Balderas' testimony. Balderas testified that they ran over the victim's body with the car. The pathologist testified that marks on the victim's body were not consistent with having been run over by a vehicle. However, this aspect of appellant's testimony was confirmed by Ms. Garcia, who testified that whoever did the

killing ran over the body. Balderas also testified that as a result of running over the body it was turned. The pathologist testified that running over a body was unlikely to result in its turning. Balderas further testified that she went back after the incident and twisted the belt around. The pathologist testified that such an action would have caused abrasions which were not present on the body. Balderas testified that she observed blood come from the victim's nose. An expert testified that no trauma to the nose was observed during the autopsy.

Balderas testified that the victim used heroin on the morning of the murder. An expert testified that it was unlikely that such narcotics could be flushed from the bloodstream in only eight hours. However, the victim's mother testified that she last saw the victim at 6 o'clock that evening. That was well over the eight-hour period covered by the stipulation. Therefore, this does not constitute an actual contradiction. Balderas testified that appellant used his belt to strangle the victim. Margie Acosta testified the belt used to strangle the victim was not appellant's. Balderas testified that there were pole lights in the cemetery. In fact, no such lights existed. Nevertheless, there were lights 100 yards away, which were sufficient for Sandra Garcia to be able to see what occurred from a distance.

Lastly Balderas admitted that she gave prior false statements to police as to what happened on the night of the murder.

The above contradictions relate primarily to events which occurred either before or after the actual murder.

They are independent of and separable from the version of events testified to by Balderas which constituted the substantial eyewitness testimony against appellant. Those contradictions do not render her testimony impossible or unbelievable but only create a conflict in the testimony and go to Balderas' credibility, which is for the trial court to evaluate. The version given by Balderas is not inherently improbable or impossible, and the court's determination to accept it is sustainable on appeal.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

BROWN, (Geo A.)

P.J.

WE CONCUR:

FRANSON

J.

ZENOVITCH

J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
October 18, 1979

I have this day filed Order _____

_____

_____

_____

_____ HEARING DENIED _____

_____

_____

_____

In re: 5 Civ. No. 4311 In re Frederick Joseph G., A Person Coming Under the Juvenile Court Law; People v. Frederick Joseph G.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

Court of Appeal
of the State of California
In and for
the Fifth Appellate District
5 Civil No. 4311

In re FREDERICK JOSEPH G., a minor
THE PEOPLE,
Plaintiff and Respondent,
vs.
FREDERICK JOSEPH G.,
Defendant and Appellant.

SUPERIOR COURT
NO. 44425
REMITTITUR
ON APPEAL
FROM THE
SUPERIOR COURT
IN
AND FOR
THE COUNTY OF
KERN 44425

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the judgment of the Superior Court in and for the County of Kern in the above-entitled cause, be and the same is hereby affirmed.*

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California in and for the Fifth Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 24th day of August, 1979, and now remaining of record in my office.

WITNESS *my hand and the seal of the Court, affixed at my office, this 24th day of October, A.D., 1979.*

KEVIN A. SWANSON,

Clerk

By R. Brown

Deputy

Judgment Recorded: June 26, 1978, Book 204, Page 433.